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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1304

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer, *Intervenor*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY AND PAPAGO TRIBE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Salt River Pima-Maricopa Indian Community and the Papago Tribe request leave to file the attached Brief *Amicus Curiae* in support of the respondent United States of America. The United States has consented to the filing of this brief. At the time of filing, no response to the request for consent had been received from the petitioners.

The Salt River and Papago Tribes occupy lands in the State of Arizona set aside by Executive Order for their permanent use and occupation. Each of the

Tribes is dependent upon groundwater as a major source of water supply. The question of whether the implied reservation doctrine extends to groundwater is of vital significance to them.

Although matters relating to Indian rights and hydrological factors have been mentioned in the briefs of the parties and the *amici* states submitted to this Court, the Tribes are aware that the factual setting of the instant case precluded adequate discussion of these issues therein. For this reason, the Tribes have undertaken in the attached Brief *Amicus Curiae* to touch upon certain general hydrological considerations to provide a more complete perspective on the groundwater question at issue as well as several important legal factors omitted from other discussions regarding the nature and extent of Indian rights in reserved lands. The Tribes feel that the discussion contained in the attached brief will add a different perspective to the questions at issue in this case.

The Salt River Pima-Maricopa Indian Community and the Papago Tribe, therefore, respectfully request this Court to grant permission to file the attached brief.

Respectfully submitted,

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17 October 1975

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BRIEF AMICUS CURIAE OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY AND PAPAGO TRIBE

I.

SURFACE AND GROUNDWATER SHOULD NOT BE ACCORDED SEPARATE TREATMENT UNDER THE IMPLIED RESERVATION DOCTRINE.

In applying the reserved rights doctrine to Devil's Hole in Death Valley National Monument, the Court of Appeals for the Ninth Circuit properly treated groundwater in the same manner as this Court has

treated surface waters. Based upon principles enunciated in prior decisions of this Court, the Court of Appeals found that the power of the United States to reserve waters for the use and benefit of federal enclaves extended to underground as well as surface water. *See United States* v. *District Court of Eagle County,* 401 U.S. 520 (1971); *Arizona* v. *California,* 373 U.S. 546 (1963); *Winters* v. *United States,* 207 U.S. 564 (1908). *Amici* Tribes believe that the Ninth Circuit has correctly decided the reserved water rights issue and that the principles underlying these decisions compel affirmance of their decision below.

Amici further submit that apart from the sound legal theories upon which the Ninth Circuit decision is based, other important considerations also support the application of the implied reservation doctrine to groundwater.

Petitioners and the *amici* states supporting their position urge, in one form or another, that this Court draw a hard and fast distinction between ground and surface waters. They ask that reserved rights be limited to surface waters. In so doing, they seek to repeat the mistakes of the past which have recently been recognized and universally condemned. Worse, they are urging the adoption of laws and policies that are in direct conflict with physical realities and which will inevitably lead to wasting the West's most valuable natural resource.

The first principle to be recognized in analyzing the relation of the reserved rights doctrine to groundwater is that the outcome is in no way determinative of the quantum of the reserved right. Whether or not reserved rights include groundwater can not increase

or diminish the amount of irrigable land or the quantity of water required to fulfill the purpose(s) for which a particular reservation was established. A refusal to apply the reserved rights doctrine to groundwater would simply compel the federal government and the Nation's Indian tribes to satisfy their prior and paramount rights exclusively from surface waters, even if such waters were already over-appropriated and there existed available groundwater that could be utilized. No federal establishment would be willing to switch to or depend upon groundwater where its potential groundwater rights were more precarious and subject to interference by others than its reserved rights to surface waters.

A second consideration is that an inflexible rule restricting the implied reservation doctrine to surface waters would not permit optimal use to be made of existing sources of water supply. Such a restriction would further burden many already overtaxed state surface water systems and preclude utilization of alternative sources of water supply where the interests of the water system so demanded.

To appreciate the negative features of such a rule, one must look at what effect it would have if applied to a situation where the surface water supply is already over-appropriated and groundwater is available for utilization. Notwithstanding the existence of the latter source of water supply, the holder of the reserved right would be compelled to use surface water thereby further burdening the surface water system to the detriment of all existing water users. However, if groundwater were included within the scope of the reserved right, the federal reservation in such circumstances could draw upon that source of water in order

to lessen interference with existing uses. Such a measure would increase the amount of water available for use in a given water system.

The concept of using alternative sources of water supply in water shortage areas is not new. The desirability of this type of flexibility insofar as water and water rights are concerned has long been recognized. Illustrative of the situations where use of alternative sources of water has been considered is the well-known California Supreme Court case, *Rancho Santa Margarita* v. *Vail,* 11 Cal. 2d 501, 91 P.2d 533 (1938). In that case, suit was brought by a lower riparian landowner against an upstream user to enjoin interference with the flow of the Temecula-Santa Margarita River. There was insufficient surface water to supply all the riparian needs of either the upper or the lower riparian landowner. The State Supreme Court ordered the lower court on retrial to work out a physical solution to the problem investigating the possibility of requiring the lower riparian landowner to satisfy part of his needs from the groundwater table underlying his lands. Requiring all of the surface flow to reach the downstream landowner would have been wasteful.[1]

It is this type of flexibility which would be destroyed by a rigid rule restricting the implied reservation doctrine to surface water. A rule of this sort would compel the overburdening of surface water systems notwithstanding the existence of alternative sources of water supply.

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[1] Recently the National Water Commission encouraged the states to use the type of flexibility employed by the California Supreme Court in deciding water rights cases. ". . . [T]he states should consider employing the flexible powers of the equity court to least-cost physical solutions." National Water Commission, "Water Policies for the Future, Final Report to the President and the Congress of the United States", p. 232 (1973).

A further consideration which supports the extension of the implied reservation doctrine to groundwater is the physical interdependence of surface and groundwater systems. Physical and hydrological factors plainly demonstrate the irrationality and destructiveness of making the surface-groundwater distinction that is so strenuously urged by petitioners.

It is a well-settled hydrological fact that surface and groundwaters are often physically interconnected. "Water Policies for the Future", *supra* at 233. Where this relationship exists, the use of one water source directly affects the supply of the other. *See* C. Corker, "Groundwater Law, Management and Administration", pp. 146-147, prepared for the National Water Commission, October, 1971. *Also see* R. Moses, "Basic Groundwater Problems", 14 Rocky Mt. Min. Instit. 501, 518-522 (1960). Accordingly, the regulation of either surface or groundwater must take into consideration the existence and regulation of the other. Where this conjunctive regulation does not occur, chaos and confusion in the administration and management of water resources results.[2]

In many states, the use of surface waters came first, followed by groundwater users pumping from aquifers interconnected with the surface streams. Over a period

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[2] Arizona, Colorado, New Mexico and Texas are prime examples of states which have not adequately regulated the use of groundwater nor considered the interdependence between surface and groundwater in their laws regulating these two sources of water supply. *See* "Water Policies for the Future", *supra* at 233-238, for a detailed discussion of the problems encountered by these states in attempting to rectify their past failures to consider the interconnection of surface and groundwater in the regulation of water resources in their respective states.

of time, depletion of the underground aquifer (as a result of pumping faster than the aquifer could be naturally recharged) reduced surface flow, causing senior users to be deprived of their prior right to the use of water by junior pumpers. As a result of the dual water allocation systems in some states, the successful coordination of the rights and priorities of surface and groundwater users has been a virtual impossibility. *See* "Water Policies for the Future", *supra* at 233. The effects of this "hydrologic bicycle" (R. Moses, "Basic Groundwater Problems", *supra* at 503) have been so serious that experts now strenuously urge that the elimination of ". . . arbitrary distinctions between surface and groundwater . . . be an overriding objective." C. Corker, "Groundwater Law, Management and Administration", *supra* at 147.

Recognizing the destructiveness of state water law systems which fail to take into account the hydrological relationship between surface and groundwater, the National Water Commission has specifically pointed out the need for integrated treatment of surface and groundwater:

> The Need for Integration: Ground water is often naturally interrelated with surface water: ground water feeds springs and surface streams, and surface water charges ground water reservoirs. Nevertheless, there persists in the laws of many States myths (long ago abandoned by hydrologists) that ground water is separate from and unrelated to surface water.
>
> Recommendation No. 7-1: State laws should recognize and take account of the substantial interrelation of surface water and ground water. Rights in both sources of supply should not be separate codifications of surface water law and ground water law; the law of waters should be a single, integrated body of jurisprudence. "Water Policies for the Future", *supra* at 233.

The conjunctive treatment of surface and groundwaters is not merely a theory that assumes importance only in the context of conflicting claims by one state water user against another. It is equally important, where, as here, the rights involved are federal against state.

Amici believe that a decision to afford disjunctive treatment to surface and groundwater under the implied reservation doctrine would be disastrous to those states having federal reservations within their boundaries, as well as to the reservations. To illustrate the destructiveness of such a decision, one need only look to the practical effect such a restriction would have on the state in which *amici* Tribes are located. The circumstances affecting the Papago Tribe are ideal for examination.

The San Xavier portion of the Papago Reservation lies within the Santa Cruz River System. The eastern portion of the San Xavier Reservation is traversed by the Santa Cruz River. From time immemorial, surface flow from this river was used to irrigate Papago lands. Uncontrolled, off-reservation groundwater pumping by state water users [3] extinguished the surface flow in the river forcing the Papagos in recent years to abandon surface diversion as a method of

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[3] Arizona basically adheres to the reasonable use doctrine which permits unlimited pumping of groundwater so long as it is put to beneficial use of the overlying lands. *See* Bristor v. Cheatum (Bristor II), 75 Ariz. 227, 255 P.2d 173 (1953). *Also see* D. Mann, "Law and Politics of Groundwater in Arizona", 2 Ariz. L. Rev. 241 (1959-1960).

irrigating their lands. The water table underlying the reservation dropped to such a level that surface flow could not be maintained. Presently, the Santa Cruz River flows only when least needed—in time of flood. As a result, the Papagos have been required to pump groundwater to meet their water needs.[4] No alternative water sources are presently available.

Because of the existence of a physical relationship between surface and groundwater in the water systems serving the San Xavier Reservation, a holding that the implied reservation doctrine extends to surface but not to groundwater would mean that no one whose claim is junior to that of the Papago Tribe could pump groundwater required to maintain the stream flow on the reservation. Paradoxically, this would produce nothing short of economic waste of the groundwater resources concerned. Valuable water resources would be utilized to maintain stream flow rather than put to their optimal use.

The result described in this illustration could easily occur. As to those persons whose pumping activities commenced subsequent to the date of the establishment of the reservation (nearly all current users), the Papago surface water rights are prior and paramount,

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[4] The groundwater level underlying the reservation has dropped so drastically in recent years that pumping is becoming economically unfeasible. To rectify this situation the United States on behalf of the Tribes and the Tribes have brought suit against several major water users who are pumping adjacent to and in the vicinity of the reservation. *See* United States v. City of Tucson *et al.*, (D. Ariz. Civ. No. 59-39 TUC JAW, filed February 20, 1975); Papago v. Pima Hiking Co. *et al.*, (D. Ariz., Civ. No. 75-51, filed March 6, 1975).

and as such, are entitled to protection against interference. *Winters* v. *United States,* 207 U.S. 564 (1908).

Since the protection of reserved rights in surface flow would negate the effect of excluding groundwater from the application of the implied reservation doctrine, there are no benefits to be gained from making a legal distinction between the hydrologically connected water sources. There are, however, significant benefits that would accrue from including groundwater within the scope of the implied reservation doctrine. If a federal reservation were not utilizing its groundwater entitlement, or any portion thereof, that amount could be pumped by water users pursuant to state law. Should the water become necessary for reservation use, pumping by state water users would be reduced correspondingly. This result would be infinitely preferable to restricting the pumping activities of state water users in order to maintain the stream flow.

Applying the implied reservation doctrine to groundwater promotes economic and efficient use of existing sources of water supply. Restricting the doctrine to surface water, ignoring the interrelation between surface and groundwaters and applying one set of laws to surface waters and a disparate set to groundwater, all as urged by the petitioners and their *amici,* would create problems far worse than the reserved rights doctrine they indirectly seek to undercut. The path of least resistance as well as sound and practical water resource management lies in the course adopted by both the District Court and the Court of Appeals and urged by the National Water Commission and all of the scholars who have recently addressed

the issue—conjunctive treatment of ground and surface waters.[5]

II.

INDIAN WATER RIGHTS CLEARLY EXTEND TO BOTH GROUND AND SURFACE WATER

Several of the briefs submitted to the Court have made specific reference to Indian reservations in their discussion of the implied reservation doctrine.[6] Limiting interpretations as to the scope of the doctrine are urged with equal force against both reservations set apart for Indian purposes as well as those established for other purposes. *Amici*, therefore, feel that it is necessary to clarify for the Court certain principles that apply to Indian rights in reserved lands which preclude the imposition of the asserted limitations on Indian water rights.

A. Indian Reservations and the Extent of Indian Rights in Such Lands.

Foremost among the principles to which *Amici* refer is the nature of the rights held by Indians on the lands reserved for their exclusive use and occupancy. At

[5] For an excellent example of superb judicial treatment of a complex groundwater—surface water—imported water—problem in the Los Angeles area, *see* City of Los Angeles v. City of San Fernando, —— Cal. 3d ——, 537 P.2d 1250 (1975). The Supreme Court of California affirmed its prior holdings that Los Angeles' Pueblo right, which closely resembles the reserved rights here at issue but traces its origin to Spanish and Mexican Law, includes the ground as well as surface contributors to the Los Angeles River system. The Court's opinion also illustrates the obvious problems that would be created by disjunctive treatment of ground and surface waters.

[6] *See, e.g.*, Brief of Intervenor-Appellant State of Nevada, pp. 14-20; Brief of *Amicus Curiae* State of California, pp. 6-8.

the core of the reservation system was the federal policy of transforming Indians from a nomadic to a pastoral and civilized people. *Winters* v. *United States*, 207 U.S. 564, 576 (1908). To accomplish this goal, it was thought necessary to secure to the Indian people a permanent home through which their "improvement, comfort and welfare" would be promoted and through which they would ultimately become "self-supporting as a peaceable and agricultural people." *Conrad Investment Co.* v. *United States*, 161 F. 829, 831-832 (9th Cir. 1908). *Also see United States* v. *Walker River Irrig. Dist.*, 104 F.2d 334, 339 (9th Cir. 1939).

To this extent, the federal government has assured to Indian tribes "unqualified possession of the land in perpetuity." *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1939). This "unqualified possession" is in fact beneficial ownership of the lands occupied and is considered "as sacred and safeguarded as is fee simple absolute title." 304 U.S. *supra* at 117; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-565 (1903). It is clear from the nature of Indian possession that all incidents of landownership necessary to achieve full beneficial use of the lands are secured to Indian tribes.[7] Primary among these incidents of landownership are rights to the use of all natural resources located within the boundaries of the reservation, whether overt or latent.[8] *See United States* v. *Shoshone Tribe,* 304 U.S.,

[7] The only incident of ownership restricted to Indian tribes is the power of alienation without the consent of the sovereign. *See* United States v. Shoshone Tribe *supra* at 117.

[8] *Amicus Curiae* State of California argues that for federal reservations created prior to 1920, there could have been no intention to reserve groundwater because the state of knowledge concerning the resource was not such that the federal government could have contemplated its inclusion among the rights secured to

supra at 116; *United States* v. *Walker River Irrig. Dist.*, 104 F.2d, *supra* at 338; *United States* v. *5,677.94 Acres of Land*, 162 F.Supp. 108, 155 (D. Mont. 1958). *Also see* 34 Op. Att'y. Gen. 171, 178 (1924).

This Court and the other federal courts in the above cited decisions have consistently recognized the incidents of landownership that the various Indian tribes enjoy in the federal reservation system. The courts, in their recognition of the Indian rights in reservation lands, have decided these cases in view of the strong federal policy of making Indian reservations viable and self-sustaining.

This strong federal policy of securing a productive, permanent home for the Indians must also be viewed in light of the liberal rules of construction employed in interpreting treaties, agreements, statutes and executive orders affecting Indians. As this Court has stated many times, ambiguities must be resolved in favor of the Indians. *Antoine* v. *Washington*, 420 U.S. 194, 199-200 and 206 (1975); *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 174 (1973); *Menominee Tribe* v. *United States*, 391 U.S. 404, 406, n. 2 (1968); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956); *Winters* v. *United States*, 207 U.S. 564, 576 (1908).

Amici tribes submit that the federal policy, when viewed with the rules of construction applicable to Indians, leaves this Court no other alternative than to hold that the implied reservation doctrine extends to groundwater.

Indians. This argument is without merit. Since this issue is not before the Court, *Amici* will not attempt to refute the argument other than to state that there is ample documentation of early groundwater use by Indians in the western states.

B. Preexisting Indian Rights

The fact that reservations were to serve as a permanent homeland, upon which Indians would become self-sustaining, is not the only basis for the conclusion that Indian water rights necessarily extend to groundwater. An additional basis for this conclusion is the presence of preexisting Indian rights.

In the case of treaty reservations, for example, it is well-established that rights inuring to the Indian tribes occupying such lands did not originate by treaty but rather arose by virtue of their aboriginal occupation. At the time Indian tribes ceded their vast domain to the United States by treaty, they had "command of the lands and waters—command of all their beneficial use," whether for hunting, grazing livestock or agriculture and the arts of civilization. *Winters* v. *United States*, 207 U.S. 564, 576 (1908). The rights fixed pursuant to treaty were not "a grant of rights to Indians, but a grant of rights from them—a reservation of those not granted." *United States* v. *Winans*, 198 U.S. 371, 381 (1905). *Accord, United States* v. *Ahtanum Irrig. Dist.*, 236 F.2d 321, 326 (9th Cir. 1956), *cert. denied* 352 U.S. 988 (1957). Thus, to the extent that the right to the use of the waters was not specifically ceded or granted to the United States, it was reserved to the Indians. *Skeem* v. *United States*, 273 F. 93, 95 (9th Cir. 1921). The rights so reserved are " . . . continuing against the United States and its grantees as well as against the state and its grantees." *United States* v. *Winans*, 198 U.S., *supra* at 381-382; *Winters* v. *United States*, 143 F. 740, 749 (9th Cir. 1906).

The concept of preexisting rights is not, however, limited to treaty reservations. As to those Indian

tribes occupying Executive Order reservations in their aboriginal lands, principles similar to those discussed in connection with treaty reservations apply.

Indian tribes occupying Executive Order reservations, like treaty tribes, had command of all beneficial use of land and waters within their aboriginal domain. Such possession has always been recognized as complete and exclusive until terminated by Congress. *Lone Wolf* v. *Hitchcock*, 187 U.S., *supra* at 564-565, 34 Op. Att'y. Gen., *supra* at 180. *Also see Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974), *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279 (1955), *United States* v. *Santa Fe Ry. Co.,* 314 U.S. 339, 345-347 (1941), *Mitchel* v. *United States,* 9 U.S. (Pet.) 746, 9 L.Ed. 283, 296 (1835). The nature of a tribe's aboriginal rights are such that this Court has held that they are not extinguished in outlying lands simply because a reservation is established for the tribe. *United States* v. *Santa Fe Ry. Co.,* 314 U.S., *supra* at 353. *Accord, Gila River Pima-Maricopa Indian Community* v. *United States,* 494 F.2d 1386, 1390 (Ct. Cl. 1974); *Turtle Mountain Band of Chippewa Indians* v. *United States,* 490 F.2d 935, 945 (Ct. Cl. 1974).

The application of this rule to outlying lands makes an even stronger case for non-extinguishment of rights in those aboriginal domain lands secured to the Indians by the Executive. This position was considered and received the approbation of Attorney General Harlan F. Stone in a comprehensive opinion concerning the nature and extent of Indian rights in Executive Order reservations:

> In respect to legislation and treaties of this character [referring to those entitling Indians to the benefits of latent resources] two views are possible. First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden and latent resources, merely gives them its own property as an act of grace. *Second, that the Indian possession extended to all elements of value in or connected with their lands, and the government, in securing those values to the Indians, recognizes and confirms their preexisting right.* If it were necessary here to decide as between these opposing views, I would incline strongly to the latter; merely because the Indian possession has always been recognized as complete and exclusive until terminated by conquest, treaty, or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553. Moreover, support for this view is found in many expressions of the courts. 34 Op. Att'y. Gen., *supra* at 180. (emphasis supplied.)

These authorities, together with the rule that extinguishment of aboriginal rights will not be lightly implied (*United States* v. *Santa Fe Ry. Co.,* 314 U.S. *supra* at 354), make it clear that the rights held by tribes in such reservations are preexisting rights and that the establishment of reservations within the aboriginal domain of a particular tribe does nothing more than confirm its already complete and exclusive aboriginal occupancy rights.

Thus, the rights attaching to treaty reservations, and Executive Order reservations carved out of aboriginal lands, are not to be considered as new and acquired rights, flowing to the Indian tribes from the sovereign, but rather as an undiminished continuation of the

rights already held. Since Indian tribes at the time of reservation establishment had command of all lands and waters within their domain, a simple reduction in the area to be occupied by them could not alter the extent of the rights held.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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